F. M. S. REPORTS.

IN THE MATTER OF THE ESTATE OF LEONG SIN NAM DECEASED, LEONG MOOK NYEAN & 3 ORS. v. CHEW NYIT FAH (F) & 2 ORS.

[Original Civil Juris. (Murray-Aynsley, J.) July 7, 1941]

Wills Enactment (Enactment No. 5 of 1938) section 47 — Construction of Will and Codicil — Whether legacies in Codicil additional to or in substitution for legacies in Will — Whether clause in Will expressing desire that trustees should refer certain matters to certain persons for decision precatory or binding on executors — Whether legacy to certain wives of certain amounts per month "to meet their household expenses" are gifts to the persons named only and not to their children also — Whether direction to trustees to maintain and educate children imposes obligation to provide means of conveyance to school — Whether payment of medical expenses comes within the meaning of the word "maintenance".

The Will of Leong Sin Nam deceased contained inter alia, clauses directing his trustees

(a) to "maintain and educate" his children;

(b) to pay to his wives W.K.T., L.S.Y. and V.S.M. $500 a month "to meet their household expenses";

(c) to pay to his wife C.N.F. $120 a month "as her expenses";

(d) to pay his wife C.L.K. "$40 per month plus $20 per month for servant allowance";

and (e) that before doing any act as executors or trustees or in case of dispute they should submit the matter to certain persons whose decision should be final and which decision he desired the Court to follow.

A Codicil to the Will (without referring to directions "(c)" and "(d)") directed that his wife C.N.F. and her children should be provided with "maintenance allowance at the rate of $180 per month" and that his wife C.L.K. and her children should be provided with "maintenance allowance at $140 per month."

Held, as to (a) that while conveyance of children to and from school is a proper expediture under "maintenance and eduction" there is no obligation to provide for conveyance in any particular manner or indeed at all;

as to (b) that the gifts were to the wives only and not to their children also;

as to (c) and (d) that the gifts in the codicil were in substitution for those in the Will;

as to (e) that the intentions of the testator were precatory only;

and, in answer to a further question by the trustees;

(f) that medical expenses in respect of the children should be paid as part of the expense of their "maintenance" but that medical expenses in respect of the widows were not payable by the trustees.

The Will of Leong Sin Nam deceased contained the following clauses :—

Clause 6.

"To pay all my lawful debts and funeral expenses and to suitably maintain and educate my sons and daughters."

Clause 10.

"I direct that my wives Wong Kim Thai, Lee Soon You and Voon Soon Moi shall live together in my bungalow at Gopeng Road, Ipoh and I direct my trustees to pay to them out of my trust estate the sum of Dollars five hundred ($500) per month commencing from the date of my death to meet their household expenses. In addition to the above payment, I also direct my trustees to pay to my wife Wong Kim Thai a sum of Dollars Fifty ($50) per month, to my wife Lee Soon You a sum of Dollars Thirty ($30) per month and to my wife Voon Soon Moi a sum of Dollars Twenty ($20) per month as their respective pocket money."

Clause 11.

"I direct that my wife Chew Nyit Fah should live in the house where she is now living and I direct my trustees to pay to her Dollars one hundred and twenty ($120) per month as her expenses commencing from the date of my death and dollars one hundred ($100) red package on every Chinese New Year."

Clause 12.

"I direct that my fifth wife Chee Liew Kim should live in the house where she is now living and I direct my trustees to pay to her Dollars forty ($40) per month plus dollars twenty ($20) per month for servant allowances commencing from the date of my death and also to pay dollars one hundred ($100) red package on every Chinese New Year. In the event of her not living in the house after my death or she marries or follows another person and not remaining my chaste widow, then this payment shall cease and she shall not be entitled to any maintenance or anything from my estate."

Clause 21.

"It is my sole desire that my trustees shall before selling any of my property or buying or purchasing property or doing any other acts or matters in connection with the administration of my estate or there shall be any difficulty or difference between themselves or between themselves and any other person or persons or any other disputes arising in connection with my estate matters, I direct them to seek the advice of a president and 2 committee members of the Perak Chinese Chamber of Commerce and a president and one committee member of Kah Heng Chew Huay Kuan to settle the matter whose decision in all matters shall be final and which decision I desire the Court to follow. If any meeting by them is necessary in order to arrive at a settlement to be called in any matters touching my estate, it is my desire that the meeting should be held in my bungalow and I direct my trustees to pay to each of them a sum of Dollars ($5) as a ricksha hire."

The deceased after duly making his will executed a Codicil thereto which included the following clauses :—

Clause (1) (a) of Codicil —

"Now I hereby direct that as long as my Estate shall remain undistributed or undisposed of according to my said Will,

(1) My said second wife Choo Yat Wah (sic) and her children shall be provided with —

(a) maintenance allowance at the rate of $180 per month from the date of my demise."

Clause (2) (a) of Codicil —

"My said fifth wife Chee Liew Kim and her children shall be provided with —

(a) maintenance allowance at $140 per month from the date of my demise."

The executors of the Will and Codicil applied by summons for the determination by the Court of the following questions :—

(1) "Whether on a true construction of the last Will of Leong Sin Nam deceased and the Codicil thereto the payment of the $180 to the said Chew Nyit Fah (f) under Clause 1 of the said Codicil is additional to or in substitution for the payment of the $120 as set out in Clause 11 of the said Will."

(2) "Whether on a true construction of the last Will of Leong Sin Nam deceased and the Codicil thereto the payment of the $140 to the said Chee Liew Kim under clause 2 of the said Codicil is additional to or in substitution for the payment of the $60 as set out in Clause 12 of the said Will."

(3) "Whether on a true construction of Clause 21 of the said Will the said Clause 21 is not void for uncertainty, impossibility of performance and contrary to public policy, or whether it refers to arbitration."

(4) "Whether on a true construction of Clause 10 of the said Will the payment of the $500 is for the said Wong Kim Thai (f), Lee Soon You (f) and Voon Soon Moi (f) only and not in respect of their children also."

(5) "Whether the said Chew Nyit Fah (f) and her children are entitled to be furnished with a separate motor car to be maintained out of the funds of the estate."

(6) "Whether the proper medical expenses incurred from time to time by the respective widows for themselves or for and on behalf of their issue by the deceased should be paid by the executors in addition to all other payments to such widows or issue directed by the Will and Codicil or otherwise referred to in this summons."

Cases referred to :—

(1) *Taylor v. Sturrock* (1900) A.C. 225.

(2) *Simpsom v. Foxon* (1907) P.D. 54.

(3) *Choa Eng Wan and others v. Choa Giang Tee* (1923) A.C. 469.

(4) *Re White, Knight v. Briggs* (1925) Ch. D. 179.

(5) *Re Mitchell, Thomas v. Hoskins* (1929) 1 Ch. D. 552.

(6) *Robey v. Robey* 48 E.R. 1115.

(7) *Tuckey v. Henderson* 55 E.R. 333.

(8) *Gillespie v. Alexander* 57 E.R. 301.

(9) *Brine v. Ferrier* 59 E.R. 948.

(10) *Wilson v. O'Leary* 41 L.J. Ch. 342.

Originating Summons.

J. M. M. Lewis (*Yeoh Cheang Lee* with him) for the Plaintiffs, executors of the will :—

1. The Codicil to the will takes effect as if annexed to the Will — both will and codicil must be construed together as one testamentary disposition.

2. The will is not altered by the codicil further than is necessary to give effect to the testator's intention as shown by both will and codicil.

3. Effect must be given to the testator's intention as expressed in writing.

4. (a) As to prayers (1) and (2) in the summons it is conceded that in general where, by different testamentary instruments two legacies — whether of the same or different amounts — are given to the same person, they are presumed to be cumulative. But the context of the instruments may lead to a contrary inference and if the later instrument, as here, purports to explain, repeat or be in substitution for the earlier instrument in respect of the gift or otherwise to be the final declaration of the testator's intentions, then the later gift superseded the earlier. Here, the word "increase" implies substitution and not cumulation — if meant to be in addition to the earlier gift one would have expected clear and emphatic expression of intention to add and not to substitute.

(b) As to prayer (3) — this is a mere expression of desire and in any event, is void as tending to oust the jurisdiction of the Courts.

(c) As to prayer (4) — this payment is intended for the wives named only. The children are provided for under the "maintenance" clause (Clause 6). In any event,

the monthly cost of upkeep of the family house exceeds this sum.

(d) As to prayer (5) — there is no provision in the will or codicil authorising or obliging the executors to provide Defendant No. 1 with a motor-car.

(e) As to prayer (6) — if the Court sees no objection thereto, the executors are prepared to pay the reasonable medical expenses of the widows and issue incurred *bona fide* although there is no express provision therefor in the will and codicil.

He referred to the following authorities :—

Hailsham Vol. 34 — pages 97, 159, 193, 215, 219, 359 and 361 *Taylor v. Sturrock*[1]; *Simpsom v. Foxon*[2]; *Choa Eng Wan and others v. Choa Giang Tee*[3]; *Re White. Knight v. Briggs*[4]; *Re Mitchell, Thomas v. Hoskins*[5]; *Robey v. Robey*[6]; *Tuckey v. Henderson*[7]; *Gillespie v. Alexander*[8]; *Brine v. Ferrier*[9].

H. R. Rix for the first defendant Chew Nyit Fah, widow of the deceased :—

General rule of law and positive rule of construction that, if there is nothing in Will to show intention of testator, gifts by two testamentary instruments to the same person are to be construed cumulatively. Section 47 Wills Enactment No. 5 of 38; *Wilson v. O'Leary*[10].

Codicil shows desire to increase allowance for widows. If provision in Clause 1 of the Codicil is in substitution for provision in Clause 11 of the Will, and if, as Trustees maintain, the codicil provides for children as well so that further provision for their maintenance need not be made by Trustees then effect of substituting the provisions of the Codicil for the Will will decrease and not increase the provision for the widow.

From the wording of the Codicil it is quite clear that the testator intended to increase the benefit to the widow and accordingly ordinary rule of law applies and gifts are cumulative.

Section 43 of the Wills Enactment would appear to give whole gift in the codicil to the widow and exclude the children.

In this case the children would appear to be still entitled to maintenance under Clause 6.

S. Seenivasagam for the second defendant Voon Soon Moi, widow of the deceased, representing herself and the widows Wong Kim Thai and Lee Soon You :—

On questions No. 1 and 2: We admit that legacies given by two distinct instruments are, *prima facie,* cumulative; but this is only a rebuttable presumption, and there is sufficient internal evidence furnished by the will itself to rebut the presumption e.g. the recital in the codicil "whereas I am desirous of increasing some of the allowance.....". See *Gillespie v. Alexander*[8]; *Wilson v. O'Leary*[10].

On question No. 3: We are all agreed that this is not binding on the trustees; it is merely precatory.

On question No. 4: When Clause 10 is read with Clause 6, it is clear that this is a gift to the three widows therein mentioned.

On question No. 5: This again we are all agreed that the widow and her children are not entitled to.

On question No. 6: Upon a true construction of Clause 6 of the will the children are entitled to medical expenses in the discretion of the trustees; the widows are not.

E. C. Watson for the third defendant Chee Liew Kim, widow of deceased, supported the submissions of Mr. Rix.

Murray-Aynsley, J. :—This summons raises certain questions of interpretation arising from the will and codicil of the late Leong Sin Nam.

The first question is :—

"Whether on a true construction of the last will of Leong Sin Nam deceased and the codicil thereto the payment of the $180/- to the said Chew Nyit Fah (f) under Clause 1 of the said Codicil is additional to or in substitution for the payment of the $120/- as set out in Clause 11 of the said will".

The relevant parts of the will and codicil are :— Clause 11 of will. "I direct that my wife Chew Nyit

Fah should live in the house where she is now living and I direct my trustees to pay to her Dollars one hundred and twenty ($120/-) per month as her expenses commencing from the date of my death and dollars one hundred ($100) red package on every Chinese New Year".

Clause (1) (a) of Codicil — "Now I hereby direct that as long as my Estate shall remain undistributed or undisposed of according to my said Will,

(1) My said second wife Choo Yat Wah and her children shall be provided with:—

(a) maintenance allowance at the rate of $180/- per month from the date of my demise".

The question whether two gifts of this type are cumulative or by way of substitution is not an uncommon one. Certain English authorities were cited to me, but, as the matter has been covered by Section 47 of the Wills Enactment of 1938, I think that the consideration of English authorities is unnecessary and generally dangerous. It is conceded by the Executors that the case is one where the presumption is that the Testator intended the gifts to be cumulative; they contend however that the language of the Testator is such as to show that he intended the gift in the codicil to be in substitution for that in the will. It will be seen in clause 11 that this widow is given $120 "as her expenses", and in the codicil the words are "shall be provided with

(a) maintenance allowance at the rate of $180/-". In spite of the difference in phraseology it seems to me that both gifts were intended for the same purpose, and, therefore, it is a case of increasing an allowance within the meaning of the recital in the codicil.

Of course an extra $60 and an extra $180 are both increases and if that were all that was said, there would be nothing to displace the presumption that the legatee was intended to take both gifts.

In my opinion what settles the question is the phrase "shall be provided with". It seems to me that that indicates that the Testator means to set out in full what he intended to provide for this particular widow; therefore by implication revokes the former gift. The Executors do not contend that the gift of $100 as "red package" is affected by the codicil. As there is nothing to show that it is the same as clothing allowance, it may be that the Testator intended to give both. As the question is not raised in the summons I do not decide anything on the particular point.

The second question is :—

"Whether on a true construction of the last will of Leong Sin Nam deceased and the codicil thereto the payment of the $140/- to the said Chee Liew Kim under clause 2 of the said codicil is additional to or in substitution for the payment of the $60/- as set out in Clause 12 of the said will".

The relevant parts of the will and codicil are :—

Clause 12 of will. "I direct that my fifth wife Chee Liew Kim should live in the house where she is now living and I direct my trustees to pay to her Dollars forty ($40) per month plus dollars twenty ($20) per month for servant allowances commencing from the date of my death and also to pay dollars one hundred ($100) red package on every Chinese New Year. In the event of her not living in the house after my death or she marries or follows another person and not remaining my chaste widow, then this payment shall cease and she shall not be entitled to any maintenance or anything from my estate".

Clause (2) (a) of Codicil. — "My said fifth wife Chee Liew Kim and her children shall be provided with

(a) maintenance allowance at $140/- per month from the date of my demise".

Here it will be seen that the will gives $40 without specifying the purpose, and $20/- for "servant allowance". The codicil says "maintenance allowance".

Though different words are used, I consider that the same reasoning applies to this question as to the previous one; I therefore decide that the gift in the codicil is in substitution for that in the will.

The third question is :—

"Whether on a true construction of Clause 21 of the said will the said Clause 21 is not void for uncertainty, impossibility of performance and contrary to public policy, or whether it refers to arbitration".

The relevant part of the will is :—

Clause 21 of will. — "It is my sole desire that my trustees shall before selling any of my property or buying or purchasing property or doing any other acts or matters in connection with the administration of my estate or there shall be any difficulty or difference between themselves or between themselves and any other person or persons or any other disputes arising in connection with my estate matters, I direct them to

seek the advice of a president and 2 committee members of the Perak Chinese Chamber of Commerce and a president and one committee member of Kah Heng Chew Huay Kuan to settle the matter whose decision in all matters shall be final and which decision I desire the Court to follow. If any meeting by them is necessary in order to arrive at a settlement to be called in any matters touching my estate, it is my desire that the meeting should be held in my bungalow and I direct my trustees to pay to each of them a sum of dollars ($5) as a ricksha hire."

In my opinion the intention of the Testator is precatory only, which means in effect there is no obligation on the executors to refer any particular question to the persons named in the clause.

The fourth question is :—

"Whether on a true construction of Clause 10 of the said will the payment of the $500/- is for the said Wong Kim Thai (f), Lee Soon You (f) and Voon Soon Moi (f) only and not in respect of their children also".

The relevant part of the will is :—

Clause 10 of will. — "I direct that my wives Wong Kim Thai, Lee Soon You and Voon Soon Moi shall live together in my bungalow at Gopeng Road, Ipoh and I direct my trustees to pay to them out of my trust estate the sum of Dollars five hundred ($500) per month commencing from the date of my death to meet their household expenses. In addition to the above payment, I also direct my trustees to pay to my wife Wong Kim Thai a sum of Dollars fifty ($50) per month, to my wife Lee Soon You a sum of Dollars thirty ($30) per month and to my wife Von Soon Moi a sum of Dollars twenty ($20) per month as their respective pocket money".

In my opinion that amounts to a gift to the persons named only. There is nothing in the clause to restrict the discretion given to the executors under Clause 6 of the will.

The fifth question is :—

"Whether the said Chew Nyit Fah (f) and her children are entitled to be furnished with a separate motor-car to be maintained out of the funds of the estate".

I take it that this question arises under clause 6 of the will which is as follows :—

Clause 6 of will. — "To pay all my lawful debts and funeral expenses and to suitably maintain and educate my sons and daughters".

Though it may well be that conveyance of children to and from school is a proper expenditure under that clause, there is nothing in the will to oblige the executors to provide for this in any particular manner or at all.

The sixth question is :—

"Whether the proper medical expenses incurred from time to time by the respective widows for themselves or for and on behalf of their issue by the deceased should be paid by the executors in addition to all other payments to such widows or issue directed by the will and codicil or otherwise referred to in this summons".

The answer is that, in the case of children, medical expenses come properly within the meaning of the word "maintenance" in clause 6; in the case of widows there is nothing in the will to authorise any expenditure other than that specifically allowed by the will.

The remaining question relates to costs.

I direct that the costs of all parties be paid out of the estate.

Order accordingly.